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IN THE
Supreme Court of the United States

OCTOBER TERM, 1943.

No. 168

GUY CARLETON DENNEY, *Petitioner,*

vs.

THE FORT RECOVERY BANKING COMPANY,
Respondent.

ON PETITION FOR CERTIORARI TO THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

ELMER McCLAIN,
Lima, Ohio
Counsel for the Petitioner.

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PETITION

**For a Writ of Certiorari to the United States Circuit Court
of Appeals for the Seventh Circuit.**

All emphasis in the following petition and brief is supplied unless otherwise noted. The brief in support of the petition begins at page 15.

To the Honorable Harlan Fiske Stone, Chief Justice, and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

A Summary Statement of the Matter Involved

The Statutes.

The question which is presented arises out of the redemption provisions of the farmer debtor law, Section 75 of the Bankruptcy Act, 11 U.S.C. 203.

The particular statutes which are involved are:

(1) The following portion of Section 75(s)(3):

Section 75(s)(3): "At the end of three years, or prior thereto **the debtor may pay into court** the amount of the appraisal of the property . . . and thereupon the court shall, by an order, turn over full possession and title of said property, free and clear of encumbrances to the debtor:" . . .

(2) That portion of Sections 38 and 39 of the Bankruptcy Act, 11 U.S.C. 66 and 67, which follows:

Section 38: "Referees are hereby invested **subject always to a review by the judge**, with jurisdiction to" exercise certain enumerated powers.

Section 39(a): "**Referees shall . . . prepare promptly and transmit to the clerks certificates on petitions for review of orders made by them**" . . .

(c) "A person aggrieved by an order of a referee may . . . file with the referee a petition for review of such order by a judge" . . .

The Subject Matter.

At a meeting before the judge of the bankruptcy court, attended by the farmer debtor and the respondent, on February 17, 1942, when about half of the three year moratorium under Section 75(s)(2) had elapsed, it was agreed that the farmer debtor should be permitted to redeem his farm for \$8680 within six months. See clerk's docket entry of February 17, 1942, at R. 64, bottom of page. Four months later on June 17, 1942, a journal entry, which was **not approved by the farmer debtor or by his counsel** but was approved by counsel for the respondent and signed by the District Judge, was put on. The entry recited:

"That said Bankrupt waive his right of re-appraisal, and that said debtor or Bankrupt be permitted to redeem said property as described in his petition for eight thousand, six hundred and eighty dollars (\$8680.00), to be paid into court on or before August 17th, 1942. On default thereof, said land to be sold."

This entry appears in full at R. 8. It will be noted that the words "On default thereof, said land to be sold" were not in the memorandum which appears in the clerk's docket entry of February 17, 1942, at R. 64.

Thereafter the farmer debtor filed an application in the bankruptcy court (R. 9 to 15) praying that he be permitted to have his full three year moratorium and that a rental order be reviewed upon his pending petition for review. He explained that the reason for his consent to the agreement of February 17, 1942, (R. 64), which was included in the entry of June 17, 1942 (R. 8) was as follows:

On September 4, 1940, the conciliation commissioner had entered **a rental order providing for rental to be paid for a period of seven years (1937 to 1943 inclusive)**. R. 9 and 10. This order of course was a violation of Section 75(s)(2), which prescribes three years rental following

the entry of the order. The order called for rental to be paid for the antecedent period of three years and eight months and for three years and four months subsequent thereto.

His counsel had duly filed with the conciliation commissioner a petition for review with an assignment of errors and brief. R. 11 to 13. No action was ever taken by the court on the petition for review.

At the February 17 meeting before the court the farmer debtor and his counsel for the first time learned that there was no evidence or record anywhere in the court that any petition for review had ever been filed. Nor could the original be found.¹

The respondent had then on file a petition to liquidate the farm.² The farmer debtor being suddenly confronted with the startling information that no petition for review was on file and believing he had no remedy against the seven year rental order and expecting that, under the existing conditions of easier credit because of the existing war inflation, he could borrow the money he needed, consented to an order being entered permitting him to redeem

¹ The enigma of the "lost petition for review" was later solved by the discovery of an original letter from the conciliation commissioner in which he said: "We have your application for appeal, which will be certified to the District Court in a day or two." R. 42, last paragraph of the letter of September 17, 1940. Although the record contains other references to this subsidiary subject, some of them relating to matters which occurred subsequent to the notice of appeal, the due filing of the petition for review is established.

² This was the seventh of a total of eight applications by the present respondent to terminate the proceeding in one way or another. See R. 62 to 66, and R. 69 to 71, entries of May 6, May 28, and June 9, 1937; September 3 and December 1, 1938; June 8, 1940; September 18, 1941; September 18, 1942. Of these applications one, that of June 9, 1937, was successful in the District Court but was reversed in *Denney v. Fort Recovery Banking Company*, 1938, CCA 7, 99 Fed. (2d) 712. The mandate is noted at R. 63, entry of November 15, 1938. The seventh and eighth are involved in this petition for certiorari.

within six months. R. 13, beginning at folio 12. R. 64 docket entry of February 17, 1942. R. 8, the judge's entry of June 17, 1942, four months later.

In his application, he further apprised the court that "after diligent endeavor to obtain sufficient money" he was unable to do so. R. 14, second full paragraph. He prayed that he have the benefits of the full three year moratorium and that the rental order be revised pursuant to his pending petition for review. R. 14, bottom of page.

On the day the farmer debtor's application for the full three year moratorium was heard, that is on September 18, 1942, the respondent filed its eighth application to terminate the proceeding, by liquidation. R. 65, entry of September 18, 1942. R. 15. This application for liquidation was granted without any hearing in the same order that denied the application for the full moratorium and for a revision of the rental order. R. 36 to 39. **The sole ground for this final order is stated in the words: "The Court finds that the time for redemption has expired and said debtor has failed to so redeem said lands."** R. 37, at folio 35. The appeal was taken from this final order both as a granting of the application to liquidate and as denying the application for the full moratorium and for a review of the rental order. R. 47, folio 47.

The opinions of the District Court, of which there were three, are found at R. 29 to 32; R. 45 to 47; and R. 55. The last opinion at R. 55 was rendered after the appeal was taken. R. 47. R. 55. Only the first opinion at R. 29 to 32 has been reported. It is *Denney v. Fort Recovery*, 1942, 47 Fed. Supp. 36.

The opinion of the Seventh Circuit Court of Appeals in affirming the District Court is at R. 92 to 96 and is reported as *Denney v. Fort Recovery Banking Company*, 1943, 135 Fed. (2d) 184.

II.

Statement of the Basis of the Jurisdiction of this Court.

The jurisdiction of this court is conferred by Section 240(a) of the Judicial Code; 28 U.S.C. 347 (a).

The petitioner has complied with Section 8 (a) of the Act of February 13, 1925; 28 U.S.C. 350. The final judgment of the court below (R. 97) was entered on April 19, 1943, and this petition for certiorari is filed within three months thereafter.

III.

The Questions Submitted.

1.

Section 75(s)(2) provides that "At the end of three years, or prior thereto, **the debtor may pay into court** the amount of the appraisal of the property" . . . etc., whereby the proceeding is terminated by the redemption of the property cleared of all encumbrances. Question: If the bankruptcy court enters an order that the farmer debtor "be permitted to redeem said property" for a stated sum to be paid into court short of three years "On default thereof said land to be sold" (R. 8), but the farmer debtor fails to pay said sum into court within such shortened period, may the court for that reason terminate the proceeding?

2.

Before the three year moratorium under Section 75(s) has run its course may the bankruptcy court accelerate its termination by entering an order stating that the farmer debtor is "permitted to redeem said property" before the end of the three years "On default thereof said land to be sold"?

3.

When a farmer debtor, before the end of the three year moratorium, does not "pay into court" the value of the property under Section 75(s)(3), may the moratorium be ended merely because the bankruptcy court has ordered that he "be permitted to redeem," "On default thereof, said land to be sold," and he does not so redeem.

4.

Considering the following portion of Section 75(s)(3):

"At the end of three years, or prior thereto, the debtor may pay into court the amount of the appraisal of the property . . . and thereupon the court shall . . . turn over full possession and title" . . .

may it be administered as if it read as follows:

"At the end of three years, or prior thereto, or within such shorter time as the court may fix, the debtor may pay into court the amount of the appraisal of the property, and thereupon the court shall . . . turn over full possession and title and in default of such payment within such shorter time fixed by the court, the property may be ordered sold."?

5.

If a farmer debtor requests of the bankruptcy court and is granted permission to redeem his farm before the three year moratorium has run, but is unable to pay the money into court, may the court liquidate his farm for his failure to redeem?

6.

When a farmer debtor, being aggrieved by an order of a conciliation commissioner, duly files with the conciliation commissioner his petition for review under Section 75 of the Bankruptcy Act and the conciliation commissioner does not transmit to the clerk his certificate on review may the farmer debtor so aggrieved be deprived of his right to a review by the judge?

IV.

**Reasons Relied Upon for Allowance of a
Writ of Certiorari.**

1.

This case presents an important question with respect to the procedure required by Section 75(s)(3), namely whether the provision that the farmer debtor can shorten the three year moratorium if he "**pay into court**" the value of his farm, may be modified by an order of the bankruptcy court whereby the farmer debtor is "permitted to redeem" short of such three years and the farm is ordered sold if he fails to do so?

9

2.

It presents as a question of procedure whether a bankruptcy court may shorten the three year stay under Section 75(s) by ordering the farmer debtor to redeem before that period has expired under penalty of having his farm sold if he does not so redeem.

3.

It presents the procedural question of whether the consent by a farmer debtor that the bankruptcy court shall enter an order that he be permitted to redeem his farm on penalty of being sold out if he fail to pay the money into court, empowers the court to order his farm sold prior to the end of the three year moratorium, if he does not "pay into court" the value of his farm as provided in Section 75(s)(3).

4.

It presents a question of importance in the problem of the orderly administration of the farmer debtor law.

5.

It presents a question of importance in the administration of the Bankruptcy Act, namely whether a person who is aggrieved by an order of a referee may be deprived of his statutory right to have such order reviewed by the judge because the referee does not certify to the clerk the petition for review duly filed with the referee.

6.

The final orders of the lower courts are in conflict with the statutory provision of Section 75(s) that the moratorium runs for three years unless the farmer debtor chooses to shorten under Section 75(s)(3) it by electing to "pay into court" the value of his farm. Here the lower courts sought to amend this vital provision, which gives to the farmer debtor alone the power to shorten the moratorium.

7.

They are in conflict with the decision of this court in *Adair v. Bank*, (1938), 303 U.S. 350, at page 355, where it was held in adjudicating Section 75(s) that:

. . . "further opportunity for rehabilitation is afforded the debtor, through provisions enabling him to retain possession under conditions favorable to its ultimate redemption by him."

8.

They conflict with the decision of this court in *John Hancock v. Bartels*, (1939) 308 U.S. 180. There the district court denied a moratorium to the farmer debtor because there was "no hope or expectation" of ultimate rehabilitation and this court sustained a reversal of it. Here the district court granted "permission" to the farmer debtor to redeem at a fixed date before the end of the moratorium and then ordered his farm sold solely because (quoting the final order) "the time for redemption has expired, and said debtor has failed to so redeem said lands." R. 37, folio 35.

9.

They conflict with the decision of this court in *Borchard v. California Bank*, 1940, 310 U.S. 311, reversing an order of the district court which found "the debtors had had several years within which to arrange an adjustment" and for that reason ordered the property sold before any moratorium had run. Here the district court ordered the property sold, upon the ground that "said debtor has failed to so redeem" as prematurely "permitted" by the court prior to the expiration of the statutory three year moratorium. In that case this court, at pages 316 and 317, said "'The scheme of the statute [Section 75(s)] is designed to provide an orderly procedure' . . . That orderly procedure includes . . . the entry of a stay which will assure him of his possession for three years" . . .

10.

They are in conflict with the decision of this court reversing the Seventh Circuit in *Wright v. Union Central*, 1940, 311 U. S. 273, at page 281, where in referring to the termination of a farmer debtor proceeding under Section 75(s)(3), it was held that "such termination can be effected only pursuant to the precise procedure which Congress has provided."

11.

They conflict with the decision of this court reversing the Seventh Circuit in *Wright v. Logan*, 1942, 315 U. S. 139. In that case the farmer debtor proceeding had lain dormant for nearly five years because of the inaction of the bankruptcy court and when the farmer debtors filed an amended petition under Section 75(s) the bankruptcy court denied

it and terminated the case. This court reversed the lower courts, saying, at page 181:

"Section 75(s) does not by its language condition a farmer's right to adjudication upon the diligence with which he has sought to obtain composition or extension under subsections (a) to (r). It 'applies explicitly to a case of a farmer who has failed to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a proposal for a composition or an extension of time to pay his debts.' *John Hancock Ins. Co. v. Bartels*, 308 U.S. 180, 184. That was the situation of the farmers here. And 'the Act must be liberally construed to give the debtor the full measure of the relief afforded by Congress . . . lest its benefits be frittered away by narrow formalistic interpretations which disregard the spirit and the letter of the Act.' *Wright v. Union Central Ins. Co.*, 311 U.S. 273, 279. Farmers cannot be deprived of the benefits of the Act because a court may believe that they have received the equivalent of what it prescribes. *Cf. Borchard v. California Bank*, 310 U.S. 311. We think the *Bartels*, [308 U.S. 180], *Wright*, [311 U.S. 273] and *Borchard* [310 U.S. 311], cases control our conclusion here, and that the court below was in error in dismissing the applications for adjudication under 75(s)."

Here the lack of diligence was in the court, as in the *Logan* case.

12.

The decisions of the lower courts are in conflict with the decision of the Circuit Court of Appeals for the Eighth Circuit in *Bankers v. Havel*, (1942), CCA 8, 129 Fed. (2d) 106, where that court said in the last paragraph:

"That the statute assures to the debtor possession for three years from the date of the order upon the conditions mentioned in the Act is no longer open to debate" citing the decisions of this court in *Borchard v. California Bank*, 1940, 310 U.S. 311; *John Hancock v. Bartels*, 1939, 308 U.S. 180; and *Wright v. Union Central*, 1940, 311 U.S. 273."

13.

They conflict in the same respect with the decision of the United States District Court for the Southern District of Iowa in *In re McClenahan*, 1941, 41 Fed. Supp. 694.

14.

They are in conflict with the decision of the Eighth Circuit in *Rafert v. Conway*, 1941, CCA 8, 119 Fed. (2d) 102, where it was held that when a farmer debtor proceeding has passed under Section 75(s) there is no power to deprive the farmer debtor of his lands except in strict compliance with the statute liberally construed so as to effectuate the legislative intent.

15.

They are also in conflict with the decision, announced May 24, 1943, of the Ninth Circuit in *Corey v. Blake*, which is published in the July 9, 1943, issue of the Bankruptcy Law Service as paragraph 54419. That Circuit Court of Appeals reversed the District Court and the conciliation commissioner below and held that observance of the orderly procedure required by this court in the *Bartels* and in the *Borchard* cases was not followed when the bank-

ruptcy court based its proceedings under Section 75(s) upon a stipulation of the parties.

Wherefore your petitioner prays that a writ of certiorari issue to the Circuit Court of Appeals for the Seventh Circuit directing that it certify and send to this court a transcript of the record and proceedings so that this cause may be determined by this court and for all other relief as is proper.

Respectfully submitted,

Lima, Ohio
June 11, 1943

ELMER McCLAIN, Lima, Ohio,
Counsel for the Petitioner.